In the Supreme Court of the United States

OCTOBER TERM, 1965

No. 686

MARTIN MELCHER AND DORIS DAY MELCHER, JEROME B. ROSENTHAL AND RUTH B. ROSENTHAL, PETITIONERS

v.

ROBERT RIDDELL, DISTRICT DIRECTOR OF INTERNAL REVENUE OF LOS ANGELES, CALIFORNIA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

Upon motion of the District Director, the Tax Court of the United States quashed subpoenas *duces tecum* which it had previously issued in blank to the taxpayers' counsel and which had later been served on the District Director.[1] The taxpayers then brought

[1] The subpoenas sought to obtain Revenue agents' reports, memoranda, and other government documents relating to the tax treatment of individuals other than the taxpayers, with these other individuals' names deleted. The subpoenas did not allege that the documents were in the District Director's possession. The District Director based his motion to quash on the grounds that the subpoenas were far too broad, both

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this proceeding in the district court under Section 7402(b) of the Internal Revenue Code of 1954 to compel compliance with the subpoenas. The district court, upon motion of the District Director, dismissed taxpayers' action (Pet. App. B, pp. 5–6), and the court of appeals affirmed (Pet. App. A, p. 3).

The decision below is clearly correct and there is no conflict between circuits. Accordingly, further review is not warranted.

Petitioners contend that the Tax Court has no power to quash its own subpoenas once they have been issued. But an independent administrative tribunal like the Tax Court (see 26 U.S.C. 7441), which has been given express power to compel the production of evidence by subpoena (26 U.S.C. 7456(a)(1)), is not required mechanically to issue any subpoena requested by a party, but has discretion to deny the party's application because the subpoena is overbroad or otherwise improper, or to impose reasonable conditions upon its issuance. *E.g., E. B. Muller & Co.* v. *Federal Trade Commission,* 142 F. 2d 511, 520 (C.A. 6). Equally it can—as is the practice of the Tax Court (Tax Court Rule 44(a))—issue a subpoena to the requesting party in blank, the subpoena to be completed by the party before service. Such a practice is clearly justified by considerations of adminis-

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geographically and in terms of the material sought, that they failed to describe adequately what the materials sought were, that they sought materials which could not be made public under Sections 6103 and 7213 of the 1954 Code and 18 U.S.C. 1905, and that the materials sought were in any event irrelevant and immaterial to the taxpayers' litigation in the Tax Court.

trative convenience, and, where such practice is followed, obviously the Tax Court must determine the reasonableness of the subpoena upon objection of the subpoenaed party. If it refused to entertain such objections, it would be abdicating all effective control over the issuance of subpoenas. Since the Tax Court was thus acting fully within its power in quashing the subpoenas procured by petitioners, their action under 26 U.S.C. 7402(b) to "enforce" the subpoenas was properly dismissed; as a result of the Tax Court's quashing order, there were no longer any subpoenas to enforce. Petitioners, of course, have a right to judicial review of the Tax Court's order. That right, however, is not exercisable in a § 7402(b) enforcement action, but only in an appeal to the court of appeals from the Tax Court's final decision.

For the foregoing reasons, the petition for a writ of certiorari should be denied.[2]

Respectfully submitted.

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Solicitor General.

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DECEMBER 1965.

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[2] The petition for a writ of certiorari was received by the Court on October 18, 1965, the last day for filing such petition. The certified copy of the record, however, was filed on October 21, 1965, albeit through no fault of petitioners. The petition, therefore, would appear to be untimely. Rule 22(3), Sup. Ct. Rules.

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